IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4178 of 1999

For Approval and Signature:

HON'BLE MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

NARENDRAKUMAR R PATEL

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 4178 of 1999

MR MD RANA for Petitioner No. 1

Mr. ND Gohil, AGP for Respondent No. 1

RULE SERVED for Respondent No. 2-3

CORAM : HON'BLE MR.JUSTICE H.K.RATHOD

Date of decision: 07/10/2003

ORAL JUDGEMENT

Heard learned advocate Mr. Rana for the

petitioner and Mr. Gohil, learned AGP for the respondents. Brief facts of the present petition are to the effect that the petitioner was appointed on 31st October, 1997 after following due procedure on the post of driver. He was, thereafter, sent for medical examination on 2nd January, 1998 at Civil Hospital, Surat and on 8th January, 1998 at New Civil Hospital, Ahmedabad where his case was referred to the Board of Referee by the Ahmedabad Certificate No. 87 dated 23rd February, 1999 and thereafter, the Board of Referee examined the petitioner on 20th March, 1999 and ultimately, the said Board of Referee had come to the conclusion that the petitioner who was aged about 30 years is unfit for the post of driver but fit for any other suitable post. Xerox copy of the said certificate dated 20th March, 1999 was shown to this Court by the learned advocate Mr. Rana but it is not completely legible to ascertain as to because of which defect, the petitioner has been declared medically unfit for the post of driver by the Chief District Medical Officer cum Civil Surgeon, Civil Hospital, Ahmedabad. However, it is clear that that while he was declared medically unfit for the post of driver, it was also clarified that he is fit for any other suitable post other than the post of driver.

During the course of hearing of this petition, it was submitted by the learned advocate Mr. M.D. Rana that on the basis of the said certificate wherein the petitioner was declared medically unfit for the post of driver, by order dated 3rd June, 1999, the petitioner's services were terminated only on that ground without affording any opportunity before passing the order of termination. He also submits that the case of the petitioner was not considered by the respondents for any other suitable post though it was clarified by the said authority that he is fit for any other suitable post other than the post of driver and without considering his case in that direction, his services were terminated while totally ignoring that aspect of the matter. He also points it out that the petitioner was in service from October, 1997; he remained in service upto 3rd June, 1999; meaning thereby, he remained in service for more than one year with the respondents and in the mean time, he was driving the vehicle; no any accident has taken place and no misconduct has been alleged against the petitioner. He, therefore, submits that in such circumstances, when there was some defect in the vision of the petitioner as suggested in the reply, then, the respondents ought to have absorbed the petitioner on any other suitable post other than the post of driver for which he was declared medically unfit by the civil hospital. However, since the respondents have, without

considering the case of the petitioner in that direction, the order of termination is bad in law, violative of Article 14 and also contrary to the principles of natural justice and, therefore, liable to be quashed and set aside.

On the other hand, learned AGP Mr. N.D. Gohil appearing for the respondents has submitted that the petitioner was appointed by order dated 31.10.1997 on the post of driver subject to certain conditions. One of such conditions was to the effect that he is required to undergo the medical examination and in such medical examination, he was found unfit by the civil hospital, Surat and, therefore, the respondents were right in terminating the services of the petitioner on that ground. It was his submission that looking to the fact that the petitioner was declared unfit for the post of driver for which he was selected, no fruitful purpose would have been served even if any opportunity would have been given to the petitioner before terminating his services. According to him, it was an empty and useless formality which would not have changed the ultimate out come and, therefore, the respondents are justified in terminating his services without affording any opportunity to the petitioner. He also submitted that the matter was referred to the Board of Referee by the civil hospital, Surat and the Board of Referee has again referred the matter to the civil hospital, Ahmedabad on 23rd February, 1999 and ultimately, lastly, he was examined by the civil hospital, Ahmedabad wherein he was declared medically unfit for the post of driver and, therefore, the respondents were right in terminating the services of the petitioner. He also submits that the respondents have filed detailed affidavit in reply through one KH Chavda, Admn. Officer to the Commissioner, Health, Medical Services and Medical Education (HS) Gandhinagar wherein the deponent has submitted that the petitioner does not possess the knowledge to challenge the opinion of Eye Expert and opinion of the Medical Board. According to the deponent, the petitioner has failed to advance the ground to dispute the opinion of the medical board; the petitioner was sent for medical examination on 2.1.1998 through civil surgeon, Surat and, thereafter, vide letter dated 8.1.1998, he was referred to the Medical Board Ahmedabad for the eye defect and by letter dated 27.8.1998, the Board of Referee Ahmedabad has informed the petitioner to remain present on 9.9.1998 before the board but the petitioner has not remained present in view of his ill health as per the say of the petitioner and then the Board of Referee informed the petitioner to remain

present on 11.2.1999 before the Board on 23.3.1999 and the civil surgeon examined the petitioner on 20.3.1999 and issued the certificate as aforesaid dated 23.2.1999 bearing no. 87 that it involves safety of lives of 4/5 passengers including the patients and staff; the deformity in eye in driving job certainly invites risk of lives of 4/5 passengers and, therefore, it cannot be considered to be a minor deformity and, therefore, the petitioner is not entitled to any relief in this petition and the petition is therefore required to be dismissed with costs.

I have considered the submissions made by the learned advocates for the parties. It is not in dispute that the petitioner was appointed on 31st October, 1997 after following due procedure on the post of driver; he was, thereafter, sent for medical examination on 2nd January, 1998 at Civil Hospital, Surat and on 8th January, 1998 at New Civil Hospital, Ahmedabad where his case was referred to the Board of Referee by the Ahmedabad Certificate No. 87 dated 23rd February, 1999 and thereafter, the Board of Referee examined the petitioner on 20th March, 1999 and ultimately, the said Board of Referee had come to the conclusion that the petitioner who was aged about 30 years is unfit for the post of driver but fit for any other suitable post. It is also not in dispute that in view of the fact that the petitioner was declared unfit for the post of driver, his services were terminated on that ground alone without considering his case for the other suitable post though it was clarified in the same certificate that he is fit for the other post. It is also not in dispute that before terminating his services, no opportunity was given to the petitioner and it is the submission of the learned AGP Mr. Gohil for the respondents that this would not have changed the ultimate outcome though the order of termination is having adverse effect on the livelihood of the petitioner. In light of these undisputed facts, it is the submission of the learned advocate Mr. Rana that the respondents ought to have considered the case of the petitioner for being absorbed on any other suitable post equivalent to the post of driver or any other lower category post on the basis of the medical certificate.

I have considered the submissions made by the learned advocates for the parties. I have also considered the averments made by the petitioner in the memo of petition as well as the averments made by the deponent in his affidavit in reply filed on behalf of the respondents. I have perused the Xerox copy of the medical certificate dated 20.3.1999 produced by Mr. Rana

before this court. It is correct that when the petitioner was appointed for the post of driver and worked as such for a sufficient period, and defect in his eye sight cannot be tolerated by the department because otherwise it amounts to giving licence or permission to the petitioner to drive the vehicle with defective eye sight, it will endanger the lives of the passengers and the public too moving on the road and such a risk cannot be taken by the State Government and, therefore, the respondents have passed the order of termination. However, as per my opinion, considering the length of service put in by the petitioner in the mean time from 1997 till the date of termination of his service and also considering the medical certificate wherein it has been clarified by the authority concerned that the petitioner was fit for the other suitable post, it was the duty of the respondents to consider his case for any other suitable post other than the post of driver and the respondents ought to have informed the petitioner in advance that in view of the report of the Board of referee, he cannot be continued on the post of driver and this would have enabled the petitioner to make representation for absorbing him on any other suitable post other than the post of driver. However, this has not been done and straight away order of termination has been passed without considering his case in that direction and, therefore, it cannot be said that giving of such an opportunity would not have changed the ultimate out come as asserted by the respondents. Therefore, considering the facts of this case and the principles laid down by the Hon'ble apex court in the matter of Narendra CHandla versus State of Haryana and others reported in AIR 1995 SC 519, I am of the opinion that the case of the petitioner is requiring sympathetic consideration by the respondents. In the matter of Narendra Chandla v/s. State of Haryana & Ors (Supra), it has been observed by the apex court that while working if any employee received physical disablement and due to that, if an employee is unable to perform duties of the post which he was holding, then, in such circumstances, it is not proper to transfer such an employee to the lower pay scale but it is the duty of the State Government make every endeavour to adjust such an employee in a post where he could suitably discharge his duties while protecting his last drawn salary. Relevant observations made by the apex court in para 7 of the said judgment are reproduced as under:

"7. Article 21 protects the right to livelihood as an integral facet of right to life. When an employee is afflicted with unfortunate

> disease due to which, when he is unable to perform the duties of the posts he was holding, the employer must make every endeavour to adjust him in a post in which the employee would be suitable to discharge the duties. Asking the appellant to discharge the duties as a Carrier Attendant is unjust. Since he is a matriculate, he is eligible for the post of LDC. For LDC, apart from matriculation, passing in typing test either in Hindi or English at the speed of 15/30 words per minute is necessary. For a Clerk, typing generally is not a must. In view of the facts and circumstances of this case, we direct the respondent Board to relax his passing of typing test and to appoint him as an LDC. Admittedly on the date when he had unfortunate operation, he was drawing the salary in the pay scale of Rs 1400-2300. Necessarily, therefore, his last drawn pay has to be protected. Since he has been rehabilitated in the post of LDC we direct the respondent to appoint him to the post of LDC protecting his scale of pay of Rs 1400-2300 and direct to pay all the arrears of salary."

In view of the above observations made by the apex court and also in the facts and circumstances of the present case, considering the fact that while declaring the petitioner unfit for the post of driver as per the medical certificate dated 20th March, 1999, he was declared fit for the other suitable post other than the post of driver, according to my opinion, the respondents have not applied their mind on the second aspect of the matter and have not considered the case of the petitioner and, therefore, according to my opinion, it would be just and proper and would met ends of justice if some suitable directions are issued to the respondents to consider the case of the petitioner for his absorption/posting on any other suitable post other than the post of driver as per the medical certificate dated 20th March, 1999 while keeping in view the observations made by the apex court in the aforesaid reported decision and to sympathetically consider the matter for posting of the petitioner on any other equivalent suitable post equivalent to the post of driver or to any post lower than the post of driver wherein there is no risk involved.

In view of the above discussion, respondents are directed to consider the case of the petitioner for alternative suitable post except the post of driver while protecting the pay for the post of driver, on the basis

of the certificate dated 20th March, 1999 wherein the petitioner was declared unfit for the post of driver but it was clarified that he is fit for any other suitable post while keeping in view the observations made by the apex court in the aforesaid reported decision, and by giving sympathetic consideration to the case of the petitioner to the effect that at the time when the services of the petitioner were terminated, at that time, he was aged only 30 years and still he has to survive for a long time and in absence of job or service, it is very difficult for such a person to survive and to maintain himself and his family and then to pass appropriate order with sympathetic consideration within two months from the date of receipt of copy of this order. Accordingly, present petition is disposed of. Rule is made absolute in terms indicated hereinabove with no order as to costs.

Dt.7.10.2003. (H.K. Rathod,J.)

Vyas